

ISAAC S. SMITH.

[To accompany Bill H. R. No. 231.]

MARCH 1, 1860.

Mr. NIXON, from the Committee on Commerce, made the following

REPORT.

The Committee on Commerce, to whom was referred the memorial of Isaac S. Smith, of Syracuse, New York, make the following report :

The petitioner in this case claims compensation for losses sustained by him by reason of the termination on the part of the government of a contract made by him with the United States to construct a light-house on "Horse Shoe reef," in the Niagara river, near Fort Erie, in the State of New York.

In the investigation of this case, it appears that, in the year 1851, Congress appropriated \$45,000 for the erection of a light-house on this reef; that, in the same year, the petitioner addressed a letter to the then Secretary of the Treasury, proposing to construct for the government a foundation and light-house thereon, in conformity to certain drawings and descriptions thereto annexed; that on the 18th day of November, A. D. 1851, the said Smith entered into articles of agreement with William Ketchum, esq., collector of customs and superintendent of lights at Buffalo, in behalf of the United States, for the construction of the said light-house, on a plan devised by the petitioner, submitted to the Secretary of the Treasury, and approved by him. By the terms of the contract the whole price to be paid to him for the materials and building the light-house was \$40,000; but in view of the novelty of the plan, and to secure the government against loss, if the structure should not be built so as to resist the force of the winds, the currents of the river, and the ice, it was stipulated that the government should pay to Mr. Smith, on the completion of the house "to the satisfaction of such person as should be appointed by the Secretary of the Treasury to oversee and inspect the same," the sum of \$20,000, and "a further sum of \$20,000 within twelve months afterwards, if, in the meantime, the work should be found to have successfully withstood the effects of the ice, winds, and storms, but not otherwise:" it being a part of said agreement that the first payment should be in full discharge of the said contract, if the work should have received essential damage from the causes aforesaid, or should exhibit any deficiency in its construction.

It appears that Mr. Smith immediately commenced the erection of the work; but that in consequence of the cold weather setting in, he

was unable to make any progress until the summer following, when he discovered that he and the engineers of the government were entirely mistaken in reference to the rocky character of the reef. Instead of finding it a solid rock, he excavated to the depth of eleven and one-half feet into the substance of the reef, to a point about nineteen feet below the surface of the water, without coming to rock ; but finding only boulders, gravel, shells, and sand.

Immediately on discovering that there was no rock at practicable depth below the water, Mr. Smith, on the 23d of August, 1852, applied for, and obtained from the Secretary of the Treasury, an extension of the time, and also a modification of the plan of construction ; which extension, dated 28th August, 1852, concludes in these words :

" If Mr. Smith concludes to progress with the work, agreeable to the above, *the additional time he may require* will be granted."

The committee are of opinion that, under this last contract, the petitioner was allowed such extended time as would be indicated by the use of reasonable diligence.

The evidence in the case satisfies the committee that the petitioner is not chargeable with negligence in the prosecution of the work after the time was extended, as above stated. Indeed, the testimony of Captain Benham, the engineer in charge of this work, to the probity, diligence, and energy of the petitioner, is so strong and full, and, in the opinion of the committee, so just, that they extract it from his letter to the Secretary of the Treasury of August 27, 1852, as follows:

" I would only add that I take great pleasure in giving my testimony to Mr. Smith's evident honesty of purpose in this matter ; to the desire he has constantly shown to construct the work of the best materials, and in the strongest manner ; and to his untiring industry and perseverance ; all of which would lead me to recommend, should his plan be deemed feasible upon such a sight as this one appears to be, any reasonable indulgence as to the extension of time that he may desire."

There is no pretence set up that Smith, after the extension of time, did not prosecute the work with his accustomed energy and skill.

It appears from Mr. Ketchum's letter to Mr. Corwin, of October 18, 1852, that the Secretary of the Treasury had overlooked the letter of 28th August, 1852, from the acting Secretary, extending the time of performance of Smith's contract indefinitely, or, in his own words, granting him " such time as he might require ;" this being, in legal effect, a " reasonable time." But at *this date* (October 18, 1852) the Secretary's second letter, extending the time of performance of the contract, was returned by Ketchum to the Secretary, without delivery or notice to Smith.

In his last report Captain Benham says : " Yet his persevering determination to attempt to execute his contract under so many unexpected and opposing circumstances, and against the adverse opinions of many, perhaps nearly all, other persons who have examined the subject, lead me to fear that the further prosecution of this work must result in a continued, and, perhaps, much greater pecuniary loss to the contractor ; a loss that, *notwithstanding every precaution that may*

be taken by the officers of the Treasury Department, I have reason for thinking it not only possible, but probable even, that Congress will be called upon, and perhaps successfully so, to reimburse."

On the 13th May, 1853, *after the lapse of some seven months* from the date of Benham's report, the Secretary transmitted to Mr. Smith the report of the "committee on engineering," respecting his plan for constructing the light-house; which plan had been *previously adopted*, and the time of construction extended as above stated.

To the committee this course appears to have been in violation of the extended contract on the part of the government, and unjust to Mr. Smith. It is in proof that during the winter of 1852-'53 Mr. Smith was pushing on the work on the modified plan in every part of it which would admit of prosecution during that reason; and he was doing this with the consent of the government.

The eagerness and energy with which Smith was prosecuting his contract in October, 1852, was such as to attract the attention of Captain Benham. Nevertheless, the government, by its agents, knowing this fact, at the same time seem to have meditated a rejection of the plan, but neglected to inform Smith of that intention. This conduct of the government, not through design, but neglect, seems wholly inconsistent with the rights of the petitioner. But the government, even after this rejection of Smith's modified plan of construction, *did not notify him* of the termination of his contract. But again, on the 21st of January, 1854, a period of more than eight months, the Light-house Board, by Captain Hardcastle, its secretary, issued instructions to Captain J. C. Woodruff "to *report again* upon the feasibility of Smith's plan of constructing the light-house, and to state the time which will be required for that purpose."

On the 8th May, 1854, P. G. Washington, for the Secretary of the Treasury, directed the secretary of the Light-house Board to notify Smith "that his contract for building the light-house had been annulled."

On the 12th May, 1854, Captain J. C. Woodruff, light-house inspector of the 10th district, wrote to Captain Hardcastle, the secretary of the Light-house Board, informing him that he had immediately communicated to Smith Mr. Washington's letter annulling Smith's contract for building the light-house. In this letter Captain Woodruff states: "*I have been aware that Mr. Smith has been engaged at various times during the intervals of labor on the reef in experiments to test the practicability of cutting out the stone for the footing of his shaft, excavation by drillings and blasting having failed during the last season of work on the reef. He has resumed work at the reef, clearing out the well, which had been filled by the action of the waves with stone from the adjacent compartments of the crib. This operation has been nearly completed. He has his engine ready to transport to the crib for drilling or cutting out the stone.*

"This statement seems to be called for from the nature of his reply to my letter, that the board may be advised from this office of the extent of his operations this season."

The above is a compendium of the voluminous correspondence in

relation to the execution of the petitioner's contract to build a light-house on the Horse Shoe reef.

To the committee it seems very plain that, if the government intended to avail itself of the petitioner's non-performance of his contract in respect to *time*, both the law and even fair dealing demanded that it should have so informed Smith.

This implied extension is established satisfactorily to the committee, from the fact that the government's agent and inspector of this very building knew that Smith was making every reasonable effort after the 1st of November, 1853, to complete the building; yet no intimation was given that his contract would be summarily annulled.

In the opinion of the committee, there existed no reasonable ground for the last summary rescission of the contract on the part of the government. Smith, with what must be considered the consent of the government, had been permitted to go on with the attempted fulfilment of his contract, *after* the expiration of the *last extended* time, viz: from the 1st of November, 1853, to the 12th of May, 1854. This omission of the government to give Smith notice of the repudiation of the contract was legally (to say nothing of equity) equivalent to an extension of the time.

But further, if the government, on such mature examination, *finally* annulled the contract on the ground of inadequacy of the petitioner's plan, then it is but reasonable and just that the government should have done one of two things—either to have permitted him to go on for a reasonable time after what it claims to have been the expiration of the last extension, or else to refund the expenses to which the petitioner had been put by this tardiness in coming to a right understanding of a matter so directly within the line of its duty and its constant employment. It further appears from the testimony of two of the witnesses that the "*serrated bars*" of iron proposed in the modified contract were finished, or could have been finished *in one week* after the contract was finally annulled by the Secretary of the Treasury in the spring of 1854. From this testimony it also appears that the serrated bars, as well as the boiler iron and other materials, were of the very best quality of bar and boiler iron. From this state of facts, the committee are of opinion that, in a case identical with the present, between citizen and citizen, before a court and jury, the petitioner would be entitled to indemnity for his time, labor, and expenses, as well as for such actual losses as he may have *bona fide* sustained in the purchase and resale of the unused materials for the construction of the light-house.

It also appears from the accounts and vouchers of the petitioner exhibited to the committee that his actual expenses for labor and materials furnished, after deducting for materials resold, amount to the sum of thirteen thousand five hundred and forty-three dollars and seventy-seven cents, (\$13,543 77,) exclusive of his own services during the period the work was in progress, from the 23d of July, 1851, to the time he was notified of the annulling of his contract by the government, on the 11th of May, 1854—a period of two years nine months and eighteen days. The petitioner estimates the value of his personal services at the rate of two thousand dollars per year for the

time he was employed in this work. The committee deem this sum higher than it would be reasonable to allow, all the circumstances considered, and have added to the above sum a compensation at the rate of \$1,500 per year for the above period of two years nine months and eighteen days, amounting to the sum of four thousand two hundred dollars; making in the whole the sum of seventeen thousand seven hundred and forty-three dollars and seventy-seven cents, (\$17,743 77;) for the payment of which the committee herewith report a bill, and recommend its passage.

All of which is respectfully submitted.

